

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

ORDER

Pending before the Court is an oral request by Defendant Microsoft to seal a portion of these proceedings. In conjunction with a hearing being held on the appropriate remedy for antitrust violations found by the District Court in this case and affirmed by the Court of Appeals, Microsoft has presented James Allchin, Microsoft Group Vice President for Platforms, as a witness. Having received proffers from Microsoft and Plaintiffs, the Court concludes that Microsoft's request to close the courtroom for a limited period of time shall be granted.

In response to Microsoft's request, the Court discussed the issue with counsel for both sides in a bench conference, the transcript of which remains under seal and is incorporated herein by reference. To summarize, during his cross-examination of Mr. Allchin, counsel for Plaintiffs plans to ask questions relating to three confidential Microsoft documents.¹ As these documents contain information relating generally to future plans and/or products that are not yet available from Microsoft, Mr. Allchin's responses to this line of questioning are likely to elicit confidential

¹The three documents have been marked for identification as Plaintiffs' Exhibits 1031, 359, and 332.

business information. The release of this confidential business information would prove detrimental to Microsoft's competitive standing. Due to the confidentiality of the business information at issue, the Court will not recount the details of the harm to Microsoft's competitive interests in this Order, but shall incorporate those details by reference to the bench conference conducted on the record and under seal on May 7, 2002. The parties agree that the relevant portion of the cross-examination and redirect examination should be conducted under seal and that the three documents should be admitted under seal.

Case law from the D.C. Circuit acknowledges that, in general, "[t]he first amendment guarantees the press and the public a general right of access to Court proceedings." *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991). However, this right of access is far from absolute, as courts have recognized numerous exceptions to the general rule of openness. *See Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978) (listing various exceptions). Although much of the available case law on the subject of openness arises in the criminal context, the "presumption of openness" applies in the civil context as well. *See Johnson v. Greater Southeast Community Hosp. Ctr.*, 951 F.2d 1267, 1277 (D.C. Cir. 1991). This presumption may be overcome "by an overriding interest based on findings that disclosure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984). Protecting an entity's "competitive standing" through retained confidentiality in business information has been recognized as an appropriate justification for the restriction of public or press access. *Nixon*, 935 F.2d at 287.

The D.C. Circuit has elaborated that a court contemplating restricting access to court documents should consider the following six factors:

(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.

See United States v. Hubbard, 650 F.2d 293, 317-22 (D.C. Cir. 1980). Applying these factors, the Court finds that there is no particular need for public access to the documents at issue and the testimony relating to these documents, aside from the more generalized public interest in these judicial proceedings. The Court notes that the documents were produced pursuant to the Court's May 27, 1998, Protective Order and were designated as "Highly Confidential" at that time. Microsoft has clearly objected to disclosure of this information in open court and has displayed strong property and privacy interests in maintaining the confidentiality of the information at issue. Microsoft's request to seal is unopposed, and as noted above, the relevant document and testimony will be introduced as part of the Plaintiff Litigating States' cross-examination of Mr. Allchin.

In light of Plaintiffs' proffered line of inquiry and Microsoft's proffered business interest in maintaining confidentiality, the Court finds that any release of the information discussed in the bench conference would result in "clearly defined and very serious injury" to Microsoft's business interest. *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981) (quoting *United States v. International Business Machines, Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)). As a result, the Court concludes that the States' inquiry and the redirect by Microsoft regarding these subjects should be conducted under seal, in a closed courtroom. Likewise, the Court concludes that the three documents at issue should be presented under seal. In this regard, the Court notes that the closure of the courtroom and the sealing of testimony and documents are narrowly tailored to include only the specific information which, if released, would be detrimental to

Microsoft's business interest. *See Press-Enterprise*, 464 U.S. at 510. The relevant information has heretofore remained confidential and would not become public but for its use in these proceedings. Other portions of the cross-examination of Mr. Allchin will be held in open court and on the public record, as will all other appropriate portions of evidence in this proceeding.

Accordingly, it is this 8th day of May, 2002, hereby

ORDERED that the above-specified portions of proceedings in this case shall be conducted under seal.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge